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By email Katherine.palmer-ball@usdoj.gov

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Don C. Mcilwain, Supervisory Archivist
National Declassification Center
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Timothy Rives, Deputy Director
Dwight D. Eisenhower Library
National Archives

Onaona Guay
Section Chief, Civilian Records
National Archives

Re: Lois Moore et al v. NARA, CA 20-1735 (RCL)

Dear Ms. Palmer-Ball:

This letter is in response to Mr. Mcilwain's letters dated September 16 and November 3, 2020, Mr. Rives' September 30, 2020 letter, and Ms. Guay's November 5 letter. We very much appreciate NARA's illuminating responses. It is in all parties' interest to eliminate as many potential issues as possible, as early as possible. I hope that we can narrow the issues, informally, and memorialize it in the Joint Status Report. That Report is now due on December 21, Monday, so it may be appropriate to have that due date extended.

September 16, 2020. Mr. Mcilwain responded to the request for twenty withdrawal notices from various record groups (FOIA Requests 28-48), and wrote that "it will be necessary to send copies of the documents to appropriate agencies for further review" for consultation, under 5 USC 552(a)(6)(B)(iii)(III) ("unusual circumstances" extending time to respond). Please advise whether those consultations have been requested, and, if so, if NARA can estimate response times, that would be helpful.

September 30, 2020. Mr. Rives wrote that the Eisenhower Library had searched the small volume of Presidential records subject to FOIA (records of Presidents Ronald Reagan, George H.W. Bush, William Clinton, and George W. Bush—under 36 C.F.R. § 1250.6), using "finding aids," but located no responsive records. He suggested that we may want to request a Mandatory Declassification Review for the Library's holdings of pre-1981 records. It would be helpful if Mr. Rives could provide some information about the mechanics and parameters of the search. While we have reviewed the Library's finding aids (<https://www.eisenhowerlibrary.gov/research/finding-aids>), we don't know which aids were utilized, or how.

Also, Mr. Rives wrote that NARA denied our FOIA requests on "procedural grounds." I don't believe that the request was denied on procedural grounds, but please correct me if the denial was based on anything other than a search that yielded no responsive records.

November 3, 2020. Mr. Mcilwain quoted us \$343 for NARA to produce 429 pages. In response to my question to Ms. Palmer-Ball of why we are being assessed fees notwithstanding our request for fee waivers under the news media and public interest provisions of the FOIA (5 U.S.C. §§ 552 (a)(4)(a)(iii) and (a)(4)(A)(ii)(II)), she inquired and I believe she relayed that historical records are not governed by the FOIA. I did see on NARA's website that the FOIA does not apply to "documents created by Presidents holding office before 1981 and housed in a NARA Presidential library." Do all of these records fall under the applicable regulation or other authority? Also, our April 20, 2020, FOIA request sought production in electronic format,¹ which would seem incongruent with a reproduction cost of 80 cents per page.

¹ April 20, 2020 FOIA Request at 7:

Kindly produce these records in electronic format, PDF. *See* 5 U.S.C. § 552(a)(3)(B): "In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.

We understand NARA's current policy of closing research rooms to the public. But we suggest that NARA's "not currently accepting or fulfilling reproduction requests" should not be applied to requests that are in litigation, particularly where the FOIA requests were made, and sued upon, pre-COVID. Will NARA reconsider its position on this production?

Mr. Mcilwain referred to 107 pages that were declassified in part under exemption (b)(1), apparently a subset of the 429 pages on the quote that he attached. He related that NARA has referred 6 documents totaling 73 pages to appropriate agencies for review, as well as 10 documents that had previously been released in redacted form. We are not clear whether the referenced 16 documents are among the 429 pages identified above, and whether these records are the ones referenced on the chart that he attached as having been "Referred Back to Agency."

And if NARA can provide an estimate of the times it expects for responses, please do.

November 5, 2020. Ms. Guay responded to FOIA Request Nos. 1-16. She wrote that "the vast majority" of the records are "not name-searchable," are not described at the item/document level and identifying specific documents or specific information," and that NARA is not staffed to perform such broad searches without enough more specificity to allow retrieval of the records. NARA wrote that it did conduct searches for records sought by requests 5, 6, 8.2, 9, 12, and 15,² but located

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- ² Request 5: All CIA POW records concerning the activities of the Joint Advisory Commission Korea (JACK).
- Request 6: National Security Agency POW records in Record Group 457, including the names of POWs appearing below in Appendix A, and the incidents listed below in Appendix B. This is to include records from the NSA predecessor, the Armed Forces Security Agency.
- Request 8.2: Korean and Cold War POW records in... (2) The Combined Command Reconnaissance Activities Korea (CCRACK).
- Request 9: All POW records generated from the 6004th and 6006th Air Intelligence Squadrons (AISS), including but is not limited to all files regarding Project American. Project American was the repository file for all U.S. Air Force personnel missing in the Far East.
- Request 12: All POW records produced by the U.S. Air Force Security Service
- Request 15: Record Group 38, all completed Naval forms, Identification data on missing U.S. Naval and Marine Personnel, from February of 1956, regarding Korean POWs believed to be in the Soviet Union.

no responsive records. For the balance of the requests, NARA conducted no searches, for the reasons recounted above. Ms. Guay was nice enough to identify Record Groups that may contain responsive records, and provide the number of boxes, and whether they were "Unrestricted," or "Restricted Partly," meaning that the box contains withdrawal slips.

NARA recites that, for the searches that it did perform, it used finding aids. If NARA has a record of those searches, or what finding aids it utilized, that may be helpful in eliminating at least that portion of the search as an issue to be adjudicated. I assume that the aids it used are among those listed on its website, at <https://www.archives.gov/publications/finding-aids/guides.html>.

Further, NARA explained, it uses "the filing schemes used by the transferring agency," and that most files were "not indexed before they were transferred to NARA," so that NARA does not know the contents of the boxes, or files. If Ms. Guay could provide the indices that she does have, or identify which files that NARA does or does not have an index for, that would be helpful.

Ms. Guay wrote that NARA could not say for certain whether withdrawal slips were in an "archival box" or a "FRC box." As she responded to requests 1-16, and requests 28-48 are for records corresponding to the withdrawal slips (addressed by Mr. Mcilwain in his September 16 letter), please advise whether withdrawal slips are related to Ms. Guay's response. Perhaps she was informing us that the "Restricted Partly" boxes are either archival boxes with around 800 pages, or FRC boxes containing around 2,500, but that NARA "cannot make that determination with certainty... without physically viewing each of the boxes." Does that mean that NARA has no record of the box type at all, or that it has a record of the box type for some boxes, but not others? If the latter, please provide the information that NARA does have.

So, please let us know whether it is accurate to say that NARA has completed all searches that it intends to conduct. To summarize, we are asking:

- What finding aids NARA used, and, if it has any record of its searches, whether it will describe its searches or otherwise provide a paper trail of those searches.
- Whether NARA has any estimate of Agency responses to the twenty withdrawal notices from various record groups (FOIA Requests 28-48), or the records referenced in the November 3 letter.
- Whether Mr. Mcilwain can clarify whether the chart that he attached to his November 3 letter refers to the 429 pages that he references in his letter.
- Whether NARA will reconsider its positions on (1) producing records in the short term, given the litigation, (2) the request for fee waivers, and (3) the production of records in electronic format.
- Whether NARA will provide the indices that it does have, and identify to the extent that it can which boxes are archival boxes or FRC boxes.

While we understand that some of the information requested would be supplied in a *Vaughn* index accompanying dispositive motions, an exchange of the information now would obviate the necessity of addressing issues in affidavits, or in motions. I think it advisable for the Joint Report to be as fulsome as possible. If NARA agrees with this approach, but needs more time to supply information for its inclusion in the Joint Status Report, due on Monday, I would be happy to seek an extension of time, to whenever would be convenient for NARA.

Sincerely,

/s/
John H. Clarke

cc: Lois Moore
Robert Moore
Jana Orear
Christianne O'Malley
John Zimmerlee
Mark Sauter